

EXHIBIT 2

1 IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT
2 DU PAGE COUNTY, ILLINOIS

3 JANE DOE, individually and on)
4 behalf of all others similarly)
5 situated,)
6)
7 Plaintiff,) 20 L 1400
8) (Motion)
9 - vs -)
10)
11 ELMHURST UNIVERSITY,)
12)
13 Defendant.

14 REPORT OF VIDEOCONFERENCE PROCEEDINGS

15 had at the HEARING of the above-entitled cause, before
16 the Honorable BRYAN S. CHAPMAN, JUDGE OF, DuPage
17 County, Illinois, recorded via Zoom and transcribed by
18 TRINA M. SPIZZIRRI, Certified Shorthand Official Court
19 Reporter, commencing on the 18th day of NOVEMBER, 2021.
20 PRESENT:

21 BRIAN K. MURPHY,

22 appeared on behalf of the Plaintiff;

23 MR. CHRISTOPHER F. ALLEN,

24 appeared on behalf of the Defendant.

1 THE COURT: All right. Good morning, everyone.
2 This is courtroom 2010. This is 20 L 1400, Doe versus
3 Elmhurst University.

4 Do the parties want to go ahead and identify
5 themselves for the record?

6 MR. MURPHY: Good morning, your Honor.

7 Brian Murphy on behalf of the plaintiffs. In
8 my office with me as well is Jonathan Misney (sic).

9 MR. ALLEN: Good morning, your Honor.

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10 Christopher Allen on behalf of Elmhurst
11 University. My colleague, Christopher Dean, (sic) is
12 with me as well.

13 THE COURT: Ms. Olivieri, are you here to observe
14 or are you part of the case in any way, shape, or form?

15 MS. OLIVIERI: I'm just here to observe, judge.

16 THE COURT: Okay. Thanks very much.

17 Okay. We are here on Elmhurst's motion to
18 dismiss. Thank you for the courtesy copies. I've had
19 a chance to review everything. I've had a chance to
20 look at the New York State Bar case as well.

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21 Mr. Allen, it's your motion. I'll let you go
22 ahead and make your record as you like. Mr. Murphy, I
23 may have some questions for the parties. Let me just
24 say I think it's worth pointing out, and I think this

1 goes without saying on some level. You know, the Court
2 is going to have to make a decision one way or another
3 on this. And at some point, whichever way the Court
4 goes, another Court may disagree, and that's life. So
5 the Court is going to do it's level best to get this
6 one right, and we'll see where we land. But I am
7 interested in the parties' remarks today. And I look
8 forward to an enlightening conversation here this
9 morning.

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10 And, again, I may ask some questions, but I
11 certainly want to let you make your record.

12 Mr. Allen, you may proceed.

13 MR. ALLEN: Thank you, your Honor.

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14 I know, as you said, you read everything so I
15 just want to briefly highlight three main points. The
16 first is the relevance standard which is whether
17 Elmhurst is significantly engaged in financial
18 activities. And that standard comes directly from the
19 implementing regulations and specifically 16CFR313.3K1.
20 Plaintiff makes an argument in their brief that
21 Elmhurst business is education, not financial
22 activities. But that isn't the relevant question under
23 the implementing regulations. The relevant question is
24 simply whether Elmhurst significantly engages in

1 financial activities.

2 The second point I would like to make, your
3 Honor, is that it's not disputed that Elmhurst is
4 actually regulated by the GLBA. We presented
5 undisputed evidence that the Department of Education
6 monitors Elmhurst for GLBA compliance, that Elmhurst is
7 audited for GLBA compliance, and that the Department of
8 Education has specifically corresponded with Elmhurst
9 about GLBA compliance issues and has reminded Elmhurst
10 that failure to comply with the GLBA could jeopardize
11 its ability to participate in student loan programs.
12 And that determination is also backed up by a variety
13 of other evidence including the Dear Colleague letters
14 that the Department of Education has issued to colleges
15 and universities reminded them that they need to comply
16 with the GLBA. Obviously, the FTC's final rule itself
17 which specifically rejected our request for an
18 exemption for colleges and universities and then the
19 actual financial activities that Elmhurst engages in
20 which include, you know, being involved in every step
21 of the process by which students borrow 25 million
22 dollars a year in student loans and also personally
23 serving as the lender of millions of dollars of federal
24 Perkins loans over the years. And Elmhurst had an

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1 active Perkins loan portfolio of more than a million
2 dollars as recently in this year.

3 So we don't think there is any reasonable
4 dispute about whether Elmhurst is actually subject to
5 the GLBA, and we think it's the kind of easily-proved
6 issue that's appropriate for resolution on a 2-619
7 motion.

8 And the final point I would like to make,
9 your Honor, is just -- I won't (sic) exercise what it
10 is plaintiff is asking this Court to do. The FTC
11 promulgated its final rule two decades ago and since
12 that time an entire regulatory scheme has built up
13 around it. As I mentioned, the Department of Education
14 has reminded colleges and universities that they need
15 to comply with this provision. It monitors them for
16 compliance. Colleges and universities have built up
17 compliance programs around it, and plaintiff is
18 essentially asking the Court to throw that entire
19 scheme out or at least to call it into serious doubt
20 and to leave a lot of confusion as to whether colleges
21 and universities still are or are not subject to the
22 GLBA. And the only case plaintiff really cites in
23 support of that proposition is the New York State Bar
24 case which for the reasons we set forth in our brief we

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1 believe supports us and not the plaintiff.

2 And with that, your Honor, I'm happy to
3 answer any questions the Court may have. But we do
4 think that this is ready for resolution and should be
5 dismissed.

6 THE COURT: Mr. Allen, do you believe the Court
7 should apply -- are you -- is Elmhurst asking the Court
8 to apply Chevron Deference to the FTC's ruling?

9 MR. ALLEN: I certainly think that it is entitled
10 to Chevron Deference. It was the product of formal
11 notice and comment rule making. The FTC obviously did
12 receive specific comments on this question which it
13 considered and rejected and did provide an actual
14 reason for its determination which is that many, if
15 not, all colleges and universities are engaged in
16 significant student lending activities. And so we do
17 think that that determination is entitled to Chevron
18 Deference unlike, for example, the opinion letter in
19 the New York State Bar case which was not the product
02:56PM 20 of formal notice and rule making thus was not entitled
21 to Chevron Deference.

22 THE COURT: You know, my administrative law class
23 in law school focused more on nuclear power. And so
24 it's not nuclear power, but I haven't had a chance to

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1 engage in Chevron Deference sort of the red-headed
2 stepchild of setting confirmation hearings. All sorts
3 of legal doctrines get slammed and Chevron Deference
4 sometimes gets referenced every so often if you are up
5 late enough and you watch C Span and committee
6 hearings.

7 Let me ask you about the final -- the nature
8 of the final rule here that came out, the May 2000
9 final rule. We disagree -- the commission disagrees
10 that they are not financial institutions. And as we
11 know, BIPA says, any financial institution that is
12 subject to GLBA is exempt under this statute in any
13 way, shape, or form. Is it your position -- I guess it
14 kind of goes without saying, is it your position that
15 if the Court finds the FTC final rule persuasive that
16 ends the inquiry.

17 MR. ALLEN: I believe that it certainly would be
18 sufficient, your Honor. I don't think that the Court
19 needs to find that this is --

20 THE COURT: Let me rephrase that. That for
21 purposes of colleges and universities, it ends the
22 inquiry as to whether or not colleges and universities
23 are financial institutions for purposes of GLBA.

24 MR. ALLEN: I believe that is sufficient, your

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1 Honor --

2 THE COURT: A separate question about is Elmhurst
3 factually in that world. But do you agree that that
4 would end the inquiry?

5 And, Mr. Murphy, let me just ask you a
6 response there. Would you agree that if the Court
7 found that a final rule persuasive as to the nature of
8 colleges' and universities' relationships, the GLBA.

9 MR. MURPHY: No. I would, your Honor, because,
10 again, if you look at what the FTC said they said many,
11 if not all, appear to be significantly engaged and then
12 that's why we're back into this quandary in terms of,
13 okay, what does it exactly mean to be significantly
14 engaged?

15 Again, and I'll let Mr. Allen finish with
16 that but in the answer to your question, that would be
17 our position.

18 THE COURT: What's your response to that? It's a
19 federal rule, but there is some space there.

20 MR. ALLEN: Your Honor, what I would say there is,
21 you know, as the Court knows, there is a specific FERPA
22 exemption that is in there which would not be necessary
23 if, you know, there were significant doubt as to
24 whether colleges and universities, you know, were

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1 otherwise subject to the GLBA. You wouldn't need to
2 say that to the extent you are complying with FERPA,
3 you are also complying with the GLBA if there was a
4 significant open question as to whether the GLBA
5 applied to colleges and universities. And so I think
6 that that does reflect a clear intent to subject
7 colleges and universities.

8 THE COURT: You know, Mr. Murphy, one thing I
9 believe I inquired with you about or both parties
10 perhaps at one of our earlier hearings is whether or
11 not, you know, this literally may just be an issue
12 where the legislature has to fix this. This may not be
13 what was intended, but there may just be an issue here.

14 MR. MURPHY: Your Honor, if I might --

15 THE COURT: I want to lead you to something else
16 here, but I want you to --

17 MR. MURPHY: Well, I find it interesting that
18 we're talking about, we're talking about an exception
19 to BIPA to which colleges and universities are not
20 specifically mentioned which makes reference to a
21 federal statute which, again, they are not specifically
22 mentioned. They are not specifically covered. Your
23 Honor, I pointed out, you know, the original
24 Gramm-Leach-Bliley Act is 145 pages. You know, and

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1 it's got many, many provisions. It goes on and on.
2 But it's interesting to note, your Honor, in those 145
3 pages, there is not a single mention of a college of a
4 university, of a school, of a student, or a FERPA.
5 It's very clear that those weren't things to be covered
6 by this statute. And that's why -- again, we go back
7 to the plain language of the statute which is, you
8 know, the FTC can't make rules creating sort of new
9 avenues of the law. They can engage in rule making,
10 but the law itself, as we point out, repeatedly says a
11 financial institution is someone who is in the business
12 of engaging in financial transactions. That's
13 critical.

14 THE COURT: Let me engage you on that because
15 there was a footnote, I believe, in defendant's reply
16 about whether or not, and I'm not suggesting that this
17 is dispositive in the Court's mind, but it strikes me
18 that there is at least an interesting question about
19 whether or not plaintiff in this case has the kind of,
20 you know, for lack of a better term, standing to
21 address whether or not the FTC overstepped their bounds
22 or simply went outside the authority promulgated to it
23 with respect to GLBA. In other words, you might be
24 right, but that's a conversation for different day.

1 MR. MURPHY: But, your Honor, what we're talking
2 about is what did the Illinois legislature mean when
3 they provided this exemption. Who does this exemption
4 cover? Right. So at the end of the day, you know,
5 that's this Court's decision to make, and we have
6 standing to make that argument. The idea that, you
7 know, were not -- again, if the Court rules here for us
8 all that happens is that BIPA applies to colleges. It
9 doesn't have the affect. Obviously, the Court doesn't
10 have the jurisdiction, right, to sort of set aside
11 whatever the FTC did. But, certainly, the Court has
12 the authority to set in Illinois law what the exemption
13 for BIPA means. And so that's how I would respond to
14 it. I think that's a little bit of a red herring in
15 terms of, you know, procedurally, we're not seeking to
16 strike anything down. We're saying if you just follow,
17 you know, the express language of BIPA through the GLBA
18 that the exemption doesn't apply to colleges and
19 universities.

03:20PM 20 THE COURT: Let me direct you, Mr. Murphy, and I'm
21 happy to let you make your record as well. But I'm
22 particularly curious if your open to answering a
23 question I have. Defendant's reply at seven, and I'm
24 just going to read you the paragraph, and I'll invite

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1 your response to this. And there is pages seven and
2 eight of what I'd like your responses to, and we'll
3 start with page seven. And this goes to the third
4 point raised by Mr. Allen. The practical effect of
5 plaintiff's argument would be to create a situation in
6 which Elmhurst is actually subject to the GLBA and must
7 comply with its requirements or lose access to student
8 loan programs but is, nevertheless, not subject to GLBA
9 for purposes of 1425C of BIPA. That would be an
10 untenable result and one that is not supported by the
11 text of either the GLBA or BIPA. Alternatively,
12 plaintiff is asking this Court to throw out an entire
13 regulatory framework that has been in place for 20
14 years leaving colleges and universities unsure of
15 whether GLBA still applies to them and whether such a
16 decision has broader implications. Well, I invite your
17 response to that.

18 MR. MURPHY: I actually I sort of noted that
19 provision in their brief as well. But I sort of found
20 it somewhat ironic what they're complaining about is
21 having to be over protective of students' privacy
22 information. There is no inconsistency between the
23 frameworks of -- let's remember, they comply with GLBA
24 by complying with FERPA, right, so they have to protect

1 students' educational information. That's something
2 they should be doing. In BIPA, again, requires them to
3 maintain without the necessary policies and consent
4 student biometric information. There is nothing sort
5 of challenging or inappropriate about that. In fact,
6 you know, when you look at the GLBA, right, it
7 specifically says that nothing in there is supposed to
8 over take more restrictive state statutes. So, for
9 instance, there could be state statutes that actually
10 apply to legitimate financial institutions that require
11 additional requirements beyond the GLBA, and the
12 statute sort of invites that and welcomes that. So
13 forgive me if I'm not particularly sympathetic to the
14 idea that the result of them not being a financial
15 institution for purposes of the BIPA exemption means
16 they have to be more cautious about students' privacy
17 and protecting their information. That's something
18 that I think both the Illinois legislature and Congress
19 actually wanted, and it's certainly something that I
20 think their students would want.

21 THE COURT: Is it fair, Mr. Murphy, to think that
22 1425C could be read to intend to avoid a preemption
23 issue?

24 MR. MURPHY: It's certainly I suppose -- yes.

1 That's certainly possible. Obviously, as we know, I
2 think from our prior briefing, there is no preemption
3 issue here because, again, in the statute the GLBA it
4 specifically says it does nothing as it relates to
5 allowing for more restrictive state statutes. And it
6 specifically says it's not intended to do that. When,
7 again, we don't have preemption issues here because
8 when you get to the GLBA, you know, as we said, a
9 university or college is not subject to the Bank
10 Holding Act, right, they can't -- they're not -- they
11 don't fall under that. In fact, as I think we pointed
12 out in our brief, you know, a bank could never own a
13 college or university. It's not one of the things they
14 are allowed to own. And I think that's also important
15 to remember, your Honor, why the GLBA exists, why it
16 came into existence in the first place was, you know,
17 as a result of the lowering of the barriers between
18 banks and non banking activities allowing them to get
19 into things like selling insurance, engaging in
20 securities trading, things of that nature. That's what
21 brought around this statute to begin with at its core.
22 And so that's why, you know, I think a lot of the
23 issues they raise sort of are just not on point when it
24 comes to this particular circumstance.

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1 THE COURT: Mr. Allen -- I have one more question
2 for you, Mr. Murphy. But I'm going to give Mr. Allen a
3 chance to respond to your remarks there.

4 MR. ALLEN: Sure, your Honor.

5 With respect to the question about whether
6 Elmhurst is somehow complaining about having to comply
7 with two statutes, I would just like to focus the Court
8 back on the language of the BIPA exemption which says
9 that a financial institution or an affiliate of a
10 financial institution that is subject to the GLBA, that
11 BIPA does not apply in any manner to such an
12 institution. And so the question is not competing
13 obligations or anything like that. The question is
14 just under the statute is Elmhurst subject to the GLBA,
15 and that is determined by looking to the FTC
16 regulations, to look into the statute, to look into the
17 FTC regulations, to look into how regularly we should
18 actually approach this and, you know, by suggesting
19 that, you know, this Court can somehow determine that
20 the exemption does not apply but not undermine the
21 fundamental regulatory scheme, I don't see how that's
22 possible given that the exemption just asks are you
23 subject to the GLBA and that is determined by looking
24 at the regulatory scheme by looking at the regulations

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1 that the FTC has promulgated.

2 Second, on the point as to why the GLBA
3 exists, the GLBA exists to ensure that institutions
4 that collect a lot of financial information about their
5 customers, banks, or others are properly protecting
6 that information that is certainly a concern that
7 applies to colleges and universities given that, you
8 know, as we pointed out, they are heavily involved in
9 every aspect of the student lending process and
10 collected a lot of information in connection with that.
11 And it was certainly reasonable of the FTC to say the
12 GLBA protection should extend that far given the types
13 of activities that colleges and universities are
14 engaged in and the types of information that they
15 acquire as part of that process.

16 MR. MURPHY: Your Honor, if I could quickly rebut
17 that one point.

18 THE COURT: One second. I want to hear it. There
19 is something I want to ask you about.

20 Go ahead.

21 MR. MURPHY: I just want to point out, the FTC
22 didn't say they have to comply with the GLBA. The FTC
23 said if you comply with your preexisting FERPA
24 obligations, we'll deem you to have sort of complied

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1 with the GLBA. And so that's again why we're sort of,
2 in essence, punting on the issue because they didn't
3 actually make them subject to the GLBA. All they said
4 was, you know, meet your current obligations under this
5 large federal framework that Congress put in place for
6 colleges and universities. And if you do that, we'll
7 consider that compliance with the GLBA.

8 THE COURT: So, Mr. Murphy, one potential
9 distinction in your argument I wanted to point out and
10 hear your response is, it strikes the Court that there
11 is perhaps a difference between what is permissible
12 under the GLBA, perhaps a more restrictive or
13 protective state statute versus what BIPA actually did
14 here. In other words, you're correct under GLBA
15 doesn't preclude BIPA. But is it possible that the
16 BIPA statute that the Court is actually interpreting
17 has somehow exempted financial institutions that are
18 required to comply with GLBA whether or not they
19 intended to include colleges and universities or not.
20 Well, what they intended, you know, may not matter if
21 the Court finds that the FTC rule is clear and Elmhurst
22 is, in fact, you know, significantly engaged in
23 financial business or whatever this test is here I'm
24 going to get to in a second. I mean, the fact that

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1 they didn't have to exempt colleges and universities
2 may be a different question as to what the actual
3 exemption in BIPA does in its current form. Is that a
4 fair distinction?

5 MR. MURPHY: I think so, your Honor. And, again,
6 I think we always go back to sort of going back to our
7 original argument. I don't mean to do that. But at
8 the end of the day, we're supposed to be interpreting
9 what did the Illinois legislature mean when they
10 drafted that exemption. You know, the point right is
11 to, you know, give affect to their intent in that
12 regard. And, certainly, we understand they said
13 financial institutions subject to Title Five of the
14 GLBA, again, we believe when you look at that, the base
15 definition, let's just go to the definition of a
16 financial institution the GLBA. You know, it says
17 institutions that the business of which is engaging in
18 financial transactions. It's not do you significantly
19 engage in them, but you engage in some. It's that's
20 your business. Your business is engaging in financial
21 activities. And that's why we think the only entities
22 at that exemption should apply to, and we just don't
23 think it applies to colleges and universities, you
24 know, regardless of what the FTC has said.

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1 MR. ALLEN: Your Honor, may I briefly respond to
2 that?

3 THE COURT: Hold on. Yeah. Go ahead. Sure.

4 MR. ALLEN: So I don't know that, you know,
5 plaintiff's counsel is making an assumption about what
6 the legislature intended and perhaps what the
7 legislature did or did not know about the GLBA at the
8 time there was an acting BIPA. And I don't think there
9 is anything in the record indicating that that
10 assumption is warranted. Obviously, the GLBA existed
11 at this time. The relevant regulations existed at this
12 time. And I don't think there is any reason to assume
13 that the Illinois legislature did not know what it was
14 doing. And as the Court pointed out previously,
15 Illinois does not exactly have divided government. So
16 to the extent that the legislature believes that, you
17 know, the exemption speaks too broadly given how the
18 FTC has interpreted the GLBA, we do believe that is a
19 question for the legislature to address if it feels
20 that it needs to. But the suggestion that the
21 legislature made a mistake in how they drafted this
22 provision and that they must not have realized how the
23 FTC has interpreted it, I don't think there is any
24 reason to assume that that assumption is warranted.

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1 MR. MURPHY: Your Honor, if I might just rebut
2 briefly because on the prior briefing, there was, in
3 fact, evidence we put in there. If you recall, when
4 the statute, when BIPA was introduced, one of the
5 sponsors were introducing it made specific mention that
6 there was an exemption for banks. And, again, when we
7 go to, you know, when we go to the GLBA, right, it's
8 about, you know, banks and bank holding companies.
9 That's where the definition comes from, the Bank
10 Holding Act. And so I would take issue with that.

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11 The only other thing, your Honor, quickly I
12 wanted to also that reminded me in responding to their
13 brief, you know, throughout their brief they make
14 mention of things, factual things, that are sort of
15 un rebutted and that we didn't contest. And, obviously,
16 I know your Honor is aware of this, but obviously, it's
17 our position we didn't get a chance to factually
18 challenge a lot of those things because we run
19 successful in our sort of prior discovery fight.

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20 Understand why the Court did that. But I just wanted
21 to sort of make the record was clear to the extent
22 there were no factual challenges on the scope of
23 exactly what they do do in the financial sector. It's
24 because of our inability to get discovery in that

1 regard.

2 MR. ALLEN: Your Honor, if I may, we did not seek
3 or obtain a stay of discovery. We certainly objected
4 to certain discovery requests because we believed that
5 they were irrelevant. And the Court, you know,
6 obviously, heard the motion to compel on that. But as
7 a general matter, plaintiffs did get discovery on this
8 motion. They did serve requests for both documents and
9 interrogatories as to why Elmhurst believed there was a
10 financial institution and what Elmhurst financial
11 activities were. They did obtain Elmhurst financials.
12 They did obtain interrogatory responses so the, you
13 know, to the extent that counsel is suggesting there
14 was no opportunity for discovery, that is simply not
15 true.

16 THE COURT: Let me ask this question. Let me
17 actually go back to -- let me ask this question. On
18 the New York State Bar case, a couple things jumped out
19 to me. One is the informal nature of the proceeding
20 there. It's distinct from the final rule that was
21 issued in May of 2000.

22 Mr. Murphy, I'm also interested, one thing
23 that jumped out to me is that the question of whether
24 or not attorneys are institutions. That was, you know,

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1 in the Court's reading of it, once the District Court
2 for the District of Columbia kind of decided, well,
3 they are not institutions in the first place. So that
4 the die was cast. You would agree that colleges and
5 universities are institutions.

6 MR. MURPHY: Your Honor, it's funny you bring that
7 up because ironically it depends on what definition you
8 use for institution. As I was preparing for this
9 argument --

03:59PM 10 THE COURT: Don't they use a general definition?

11 MR. MURPHY: Actually, your Honor, in the GLBA in
12 the insurance section, there is actually a definition
13 they use in the insurance section that make reference
14 to corporations, partnerships, and things like that
15 that could actually muddy the waters sort of in that
16 regard.

17 THE COURT: Let me ask you this, Mr. Murphy. At
18 page eight of the defendant's reply brief reads as
19 follows: Last full paragraph, plaintiff also errors in
04:01PM 20 asserting Elmhurst has failed to demonstrate that it is
21 subject to the GLBA. As an initial matter, plaintiff
22 tellingly ignores evidence provided showing that it is,
23 in fact, subject to the GLBA. In particular, a client
24 (sic) does not respond to Elmhurst evidence that, one,

1 Elmhurst has put in place a compliance program to
2 ensure it is abiding by the GLBA. That Elmhurst is
3 audited each year for GLBA compliance. Three, the
4 Department of Education reviews those audits and
5 monitors whether Elmhurst is compliant with the GLBA.
6 And, four, the Department of Education has corresponded
7 with Elmhurst directly regarding Elmhurst GLBA
8 compliance efforts and informed Elmhurst that failure
9 to comply with GLBA would jeopardize its ability to
10 participate in federal student loan programs. And,
11 five, the Department of Education has sent multiple
12 dear colleague letters to Elmhurst and other
13 universities reminding them that colleges and
14 universities are subject to GLBA under the FTC's May
15 24th, 2000, final order.

16 Defendant maintains that plaintiff has not
17 rebutted this factual evidence. What's your response
18 to that?

19 MR. MURPHY: Well, I think some of those issues
20 were addressed in our motion to compel. That was
21 denied. Some of them -- and, again, we get back to the
22 issue, I'm not clear, at some points they argue that
23 their actual compliance with the GLBA doesn't matter.
24 It's whether or not they are subject to it or not. But

1 in this regard, it seems like they are opening the door
2 now to, okay, is it about whether or not they actually
3 do engage in compliance efforts or not? But generally
4 speaking, I would say on all those things, your Honor,
5 it gets back to the Department of Education does not
6 determine whether or not someone is entitled to be
7 covered by the GLBA or is entitled to the exemption
8 under BIPA. So I don't know that any of that stuff
9 really matters all that much. Because, your Honor,
10 actually at the beginning of their brief, they throw in
11 somebody else in addition to the Department of
12 Education which is their outside auditor concluded they
13 were subject to the GLBA. And I would say their
14 outside auditor has as much impact on that analysis as
15 I do, your Honor. To me, it's sort of what does the
16 statute say. The fact that the Department of
17 Education, you know, audits them for things like that,
18 I don't think is of any moment.

19 THE COURT: Okay. In the face of the following,
20 I've got section 1425C of BIPA provides nothing in this
21 Act shall be deemed to apply in any manner to a
22 financial institution or an affiliate of a financial
23 institution that is subject to Title Five of the
24 federal Gramm-Leach-Bliley Act, 1999, and rules

1 promulgated thereunder.

2 So the question becomes is Elmhurst
3 university a financial institution. The FTC, which was
4 Congress promulgated will make an authority to the FTC
5 with respect to GLBA. And on May 24th, 2000, the FTC
6 said in a final rule, the commission disagrees with
7 those commentators who suggest that colleges and
8 universities are not financial institutions. Many, if
9 not all, such institutions appear to be significantly
10 engaged in lending funds to customers.

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11 The question then becomes how persuasive is
12 the rule. And if it is persuasive, is Elmhurst, in
13 fact, a financial institution itself. The Court finds
14 the nature of the rule, the fact that it went through
15 formal notice and comment rule making, is persuasive.
16 The Court finds that the New York State Bar Association
17 case is distinguishable in that it was informal rule
18 making, moreover, the attorneys nature of it. The
19 nature of the issue in front of the D.C. District Court
20 was distinct and not necessarily as analogous as one
21 would hope. Moreover, the Court finds that the
22 evidence establishes free and clear of doubt, at least
23 in this Court's mind, that Elmhurst University itself
24 is a financial institution. It's important to note

04:10PM

1 that plaintiff's counsel's observations about what the
2 inner workings, I'm sorry, the inner relatedness of
3 GLBA and BIPA may, in fact, be able to coexist.
4 Nevertheless, when the Court interprets 1425C of BIPA,
5 as the Court just recited, the Court finds that
6 Elmhurst University is, in fact, exempt, is a financial
7 institution. And so the Court is going to go ahead and
8 grant the motion to dismiss because it is a financial
9 institution for the reasons I've indicated.

04:12PM 10 And, look, I understand that another Court
11 may disagree. And we may just have to get clarity on
12 that. But based on the record before it, based on the
13 plain language of the Statute, not going to the
14 legislative history, but just looking at the plain
15 language of 1425C, the Court finds that Elmhurst
16 University is a financial institution. And as a
17 result, they are exempt in any manner from BIPA
18 compliance.

19 So for those reasons, I'm going to grant the
04:12PM 20 motion to dismiss. I will obviously entertain a short
21 date if the parties would like it. I will enter any
22 language that the parties would like in this order
23 today as well. And as the Court said early on, this
24 one may, you know, other minds may disagree, and I

1 certainly appreciate that. This was brought pursuant
2 to a 619. A 619 admits the legal sufficiency of the
3 complaint and presumes a valid cause of action but
4 raises defects, defenses, or other affirmative matters.
5 And the Court finds that this is an affirmative matter.

6 The Court further finds that no meaningful
7 fact question exists on whether or not Elmhurst itself
8 is a financial institution given the record put before
9 the Court. Again, it's conceivable another Court could
10 disagree. But I think the plain language of the 1425C
11 makes clear that colleges and universities, whether the
12 legislature intended that or not in its current form,
13 1425C would apply to most colleges and universities.
14 And at the least, it would apply to Elmhurst in this
15 case.

16 So for those reasons, the motion is granted.
17 How would you parties like to proceed?

18 MR. ALLEN: Your Honor, just a quick question of
19 clarification. I presume given the nature of the
20 Court's ruling that the dismissal is with prejudice but
21 I just wanted to confirm that.

22 THE COURT: With. That in certain respects, you
23 know, or, I mean, that closes the case. Obviously, if
24 the parties wish to bring some kind of motion to

1 reconsider, they can. But this would be a final and
2 appealable order.

3 MR. MURPHY: Your Honor, I promise not to file a
4 motion for reconsideration because I don't think I'll
5 be able to change your mind.

6 THE COURT: I appreciate it.

7 Well, let me just say, I appreciate the
8 parties advocacy here. The thorny (sic) issues I think
9 plaintiff raises some very interesting and challenging
10 questions. Nevertheless, when I look at this, when the
11 Court looks at this, these are essentially questions of
12 law for a Court to decide and they have to be decided.
13 And, again, another Court may disagree, and I'll
14 certainly, you know, revisit these issues when and if
15 appropriate. But the Court doing its level best finds,
16 for the reasons I've indicated, that Elmhurst's motion
17 is dismissed. Motion is granted, and the dismissal
18 will be with prejudice.

19 Mr. Allen, will you go ahead and prepare the
20 order?

21 MR. ALLEN: Yes, your Honor.

22 THE COURT: Okay. Thank you very much.

23 MR. ALLEN: Thank you, your Honor.

24 MR. MURPHY: Thank you, your Honor.

IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT
DU PAGE COUNTY, ILLINOIS

I, TRINA M. SPIZZIRRI, hereby certify that I am a Certified Shorthand Official Court Reporter assigned to transcribe the Zoom videoconference recording of proceedings had of the above-entitled cause.

I further certify that the foregoing, consisting of Pages 1 to 30, inclusive, is a true and accurate transcript completed to the best of my ability, based upon the quality of the audio recording.

Trina Spizzirri

Official Court Reporter
Eighteenth Judicial Circuit of Illinois
DuPage County

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